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IN THE

Supreme Court of the United States

October Term, 1954. No. 626

EUGENE KORMUTH,
Petitioner

vs.

UNITED STATES STEEL COMPANY, HILLMAN COAL & COKE COMPANY and EMERALD COAL AND COKE COMPANY.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

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Eugene Kormuth, by his attorneys, Cornelius C. O'Brien, Francis J. Myers, Joseph F. McVeigh and W. Bertram Waychoff, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Pennsylvania entered in the above entitled case on November 8, 1954.

OPINION BELOW.

The Opinion of the Supreme Court of Pennsylvania is recorded at 379 Pennsylvania 365 and appears at page 15, infra. The order of the Supreme Court denying petition for reargument was entered November 30, 1954, and appears at page 22, infra.

JURISDICTION.

The judgment of the Supreme Court of Pennsylvania was entered on November 8, 1954. The order of the Supreme Court denying reargument was entered November 30, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1257(3).

QUESTION PRESENTED.

Whether the judgment of the Supreme Court of Pennsylvania deprives the plaintiff of his property without due process of law.

CONSTITUTIONAL PROVISION INVOLVED.

Amendment XIV to the Constitution of the United States.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State

wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT.

The facts in the case are set forth in detail in the pleadings and in the adjudication of the Common Pleas Court of Greene County (R. 869a), and are summarized in the opinion of the Supreme Court of Pennsylvania, page 15, infra. The facts material to the proper consideration of this petition may be set forth as follows:

In 1902 the Luse heirs, owners in fee, conveyed to the Monongahela River Consolidated Coal and Coke Company (Monongahela) all of the coal of the Pittsburgh seam in and underlying some 300 acres of their land "together with the free and uninterrupted right of way, into, upon and under said land at such points and in such manner as may be proper and necessary for the purpose of * * * mining * * * and carrying away said coal * * * together with the privilege of mining and removing through said described premises other coal belonging to the (grantee) its successors and assigns, or which may hereafter be acquired" (R. 873a-875a).

In 1911 Monongahela conveyed these premises, together with 25 contiguous tracts of the same seam, to the H. C. Frick Coke Company (Frick). At some later date, the date being immaterial to this action, United States Steel Company (Steel) became the successor to H. C. Frick Coke Company, and was substituted as a defendant in place of Frick. In 1931 Frick executed a document designated an Indenture whereby it purported to convey to Emerald Coal

Company five of the twenty-six tracts, some of which lie under the surface retained by the Luses at the time of the transfer of the coal to Monongahela. Insofar as the Luse property is concerned the conveyance from Monongahela to Frick and the purported conveyance from Frick to Emerald Coal Company contained words of grant identical to those in the original conveyance from the Luse heirs to Monongahela (R. 878a). The purported conveyance from Frick to Emerald Coal Company, however, further provided that the property was "conveyed to the Purchaser only for use by it for the purpose of transporting to or adjacent to the Monongahela River coal from other properties now or hereafter owned by or controlled by it" and that wheelage be paid by the purchaser (R. 879a).

From 1931 to 1937 Emerald Coal Company mined portions of these tracts and constructed an underground haulageway through what was known as the "Corridor", a part of which underlies a part of petitioner's property. In the mining operations in the Corridor Emerald Coal Company removed approximately 18% of the width of the merchantable portion of the Pittsburgh seam of coal leaving 82% still to be mined (R. 880a-883a).

In 1938 Emerald Coal Company, while undergoing voluntary dissolution and liquidation, conveyed to the defendant Emerald Coal and Coke Company (Emerald) a large area of the Pittsburgh seam including the portion beneath the Luse tract (R. 879a).

In 1945 plaintiff acquired about 95 acres of the surface of the Luse tract, which covered about one-half of the Luse coal conveyed by Frick to Emerald Coal Company. The trial court and the Supreme Court of Pennsylvania found that at the time petitioner acquired title he knew of Emerald's operations and of the existence of the haulageway, its purpose and use (R. 895a; infra, p. 16).

Petitioner filed his bill of complaint in equity against the defendants on December 11, 1950, praying, inter alia, for an injunction restraining the defendants from transporting

coal or other materials through the lands of petitioner and for an order requiring the defendants to account to petitioner for all moneys received by them as consideration for the illegal use of petitioner's lands (R. 20a, 29a-31a). On November 19, 1951, the Court of Common Pleas of Greene County, Pennsylvania, entered its opinion and order sustaining preliminary objections filed by Hillman and Emerald on the ground that the complaint failed to state a cause of action entitling petitioner to affirmative relief against these defendants (R. 177a-203a). Thereafter on December 12, 1951, the Court granted petitioner leave to amend his bill of complaint by adding three new paragraphs. In the thirty-second paragraph of the bill of complaint, which paragraph was added by the amended bill, petitioner alleged:

> "The taking of the right of way as above set forth by the defendants is a taking of the property of the plaintiff without due process of law and is a violation of Section I of Act 14 of the Constitution of the United States" (R. 213a).

The Common Pleas Court of Greene County entered its Adjudication and Decree Nisi on January 12, 1953, dismissing petitioner's bill of complaint for the reason that the Court concluded that petitioner had wholly failed to prove any cause of action entitling him to any relief, injunctive or otherwise, against the defendants (R. 869a-926a). Petitioner's exceptions to the Decree were dismissed in the Court's opinion dated July 20, 1953, and a final decree dismissing the bill of complaint was entered on that date (R. 980a-991a).

The rejection by the Common Pleas Court of Greene County of petitioner's claim that the use of his lands by the defendants deprived him of his property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States is implicit in its

decree and conclusions of law set forth in its original adjudication (R. 897a-913a; 919a-925a).

Petitioner duly appealed to the Supreme Court of Pennsylvania from the decree of the court below dismissing his bill in equity. In the statement of questions involved, as set forth by petitioner in his brief pursuant to the rules of the Supreme Court of Pennsylvania, four questions were presented for review. The fourth was:

> "Is the present use of plaintiff's property by the defendants a taking of land without due course of law and contrary to Art. I, Sec. 11 of the Constitution of Pennsylvania and without due process of law and contrary to the Fourteenth Amendment of the Constitution of the United States?"

In its opinion affirming the decree of the lower court, the Supreme Court of Pennsylvania held that Monongahela acquired a fee simple estate in all of the coal underlying the Luse tract; that this estate was the subject of transfer by it; that until the estate was terminated by the exhaustion of the coal, or lost by abandonment, Monongahela was entitled to the possession of the coal, and also of the space made by its removal, and was entitled to use such space in transporting coal from other lands; that there was no abandonment nor had all of the coal been mined; that not only Frick, but Hillman and Emerald were successors and assigns of Monongahela within the intendment of those terms as used in the original deed from the Luse heirs to Monongahela (infra, pp. 17, 18). The Supreme Court then stated (infra, p. 21):

> "The foregoing also disposes of plaintiff's contention that defendants' 'use of plaintiff's property * * * (is) a taking of land without due course of law and contrary to Article I, Sec. 11 of the Constitution of Pennsylvania (P. S.) and without due process of law contrary to the Fourteenth Amendment of the Consti-

tution of the United States'. There is no violation of any right; defendants are using, in a proper and legal manner, exactly what was granted by plaintiff's predecessors in title."

REASONS FOR GRANTING THE WRIT.

The holding of the Supreme Court of Pennsylvania that Emerald may transport coal owned by it and located under thousands of acres of land, through a haulageway constructed in part over petitioner's land, deprives petitioner of his property without due process of law and contravenes the prohibition of the Fourteenth Amendment to the Constitution of the United States.

It is common knowledge that coal mining is a major industry in Pennsylvania. The law of Pennsylvania is well settled, by the decisions of its courts, that there may be different estates in land: an estate in the surface, another in surface support, and another in the coal itself which lies underneath the surface. These are separate and independent estates and each may be owned by different persons at any given time. When one person, owning all three estates, conveys the coal, there is invariably included a grant of the right to mine the coal. In some cases, as in the instant case, the surface owner also waives his right to surface support. In any event, the surface owner continues to own whatever is not conveyed, including the unconveyed portion of his land beneath the surface "to the center of the earth".

The holding of the Supreme Court of Pennsylvania is an unwarranted and totally unjustified extension of the rights of a grantee in deeds conveying mining rights to coal. It introduces an entirely new concept into the law of Pennsylvania pertaining to coal deeds. There can be no doubt but that if this decision had been a part of the law of Penn-

sylvania prior to the original deed from the Luse heirs, no surface owner would have executed a deed conveying mining rights similar to those granted in this case, unless he received a consideration commensurate with the grant.

1. The rights of the owners of the several estates in the surface, the coal, and surface support, have long been the subject of litigation in Pennsylvania.

The leading case is *Lillibridge vs. Lackawanna Coal Co.*, 143 Pa. 293 (1891). In that case, the owner of all three estates leased to the defendant "all the merchantable coal together with the sole and exclusive right to mine and remove the same". The issue was whether the grantee had the right to transport through a haulageway carved out of the coal under the grantor's land other coal owned by the grantee underlying adjoining tracts of land. The case was decided upon a demurrer to plaintiff's Bill in Equity, and the decision rested largely upon the inadequacy of the pleadings. It was held that the right of way was exclusively within the grantee's own property and was subject to such use as any owner may desire to make of property belonging to himself.

It should be noted that the case was vigorously contested, being argued before the Supreme Court on February 24, 1890, and reargued almost exactly one year later on February 23, 1891. Three of the seven justices dissented. And the defendant itself was not at all confident of success, for about two weeks prior to the reargument, it obtained an express grant of the disputed right of way upon the payment of an additional consideration. See *Lillibridge vs. Lackawanna Coal Co.*, 264 Pa. 235.

The *Lillibridge* case is the foundation of defendants' contentions here, and necessarily so, for all subsequent decisions in Pennsylvania have their origin in that case.

The next case involving the identical issue was *Webber vs. Vogel*, 159 Pa. 235 (1893), where the Supreme Court categorically held that a grantee under a deed granting

similar rights "has no right to take through the pit * * * coal from an adjoining tract owned by him". For whatever reason, this was a direct reversal of Lillibridge, although no reference was made to the prior decision.

Yet, in the subsequent case of *Webber vs. Vogel*, 189 Pa. 156 (1899), involving the very same deed, the principles of stare decisis and res judicata were unceremoniously shelved in favor of the principle of expedience. The Supreme Court of Pennsylvania stated that neither party in the first *Webber* case considered the hauling of coal through the underground gangway as of much consequence. The Court noted that the *Lillibridge* case was not mentioned in the first *Webber* case and was not cited by counsel. The Court then stated:

> "It was not the intention of this court to overrule (Lillibridge). That case was argued, then held under advisement, and reargued before a full bench; after a most careful consideration, it was held by a majority of the Court, in an exhaustive opinion by our Brother Green, that in case of severance the title of the lessee was an estate in fee simple in the coal, and while such estate existed, the owner had the right to haul through the gangways coal mined from other and adjoining land. While there were three dissents from that judgment, we have since strictly adhered to the principles announced in it; for eight years it has stood as the law, and has become a settled rule of property in the great mining regions of the commonwealth. *In reliance upon it, capital has been invested and mining corporations organized.* We are not disposed to disturb it; would not even if we doubted it. While this is our settled opinion, *we do not intend that the rule in that case shall be extended beyond what was plainly decided.* While there exists by the deed to the grantee an estate in fee simple in the severed coal, and his right to the space mined out will not be distinguished from that in which the coal remains unmined, that estate,

except in very rare cases, has no badge of perpetuity. *In nearly every case, the instrument itself discloses the intention of the parties, that the coal shall be mined; that is, that the subject of the grant shall soon be exhausted or consumed;* it is severed from the under and overlying land for the purpose of turning it into money; *it would not only be a perversion of the intention to merely use such an estate to reach other coal, but such use would be a continual menace to the stability of the surface; no owner of the upper land could tell when his estate would cease to be disturbed by workings underneath.* It was intended to go no further in the case cited, than to hold, that while the purchaser of the coal was in good faith mining out his coal, his right to the use of the space made vacant by his workings as they progressed, could not be successfully obstructed by the owner of the surface; and not that by the purchase of the coal, he obtained an undisputed and perpetual right of way under another's land. The owner of the land above and below has a right to the reversion of the space occupied by the coal within a time contemplated by the parties when they sever that peculiar part of the land from its horizontal adjoiners." (Emphasis supplied.)

Hence the atmosphere was cleared. No industry investment was to be disturbed, but fair warning was given that the *Lillibridge* decision would be restricted to its facts.

2. The Luse deeds to Monongahela are the cornerstone of this case. The initial grant was nothing new; it corresponded to the grant of mining rights of every coal deed in Pennsylvania. The important language, indeed the cause of this controversy, is found in the words that follow the initial grant—"together with the privilege of mining and removing through said described premises other coal belonging to the (grantee) its successors and assigns, or which

may hereafter be acquired" (R. 875a). These are the words that defendants now say were incorporated in the deed by able counsel for Monongahela to extinguish the possibility of reverter which the second *Webber* case expressly held existed in the surface owner. It has been pointed out that counsel for the defendant in *Lillibridge* were less sure of their ground and took the precaution of purchasing the possibility of reverter before the reargument.

The Supreme Court of Pennsylvania, as well as the Trial Court, and all of the parties on both sides, recognized that the proper determination of this cause involved the meaning of the additional rights granted in the deed from the Luse heirs to Monongahela, which additional grant was incorporated in the deeds not by the grantors but by counsel for Monongahela, the grantee. This was carefully pointed out in the brief of United States Steel Company filed in the Supreme Court of Pennsylvania.

The Supreme Court further stated that to ascertain the meaning of the language used, the following rules are basic and applicable:

> "The language in the deed of conveyance should be construed most strongly against Luse and this plaintiff (petitioner); it should be so construed as to give effect to all its terms and provisions: and to the intent of the parties" (infra, p. 17).

These rules are not mere words; they represent firmly established rules of construction and their proper application in this case is a matter of essential importance.

In stating that the language in the original deeds from the Luse heirs to Monongahela should be construed most strongly against Luse and petitioner, the Court relied on the rule that generally speaking a deed is to be construed against the grantor. This is not the proper statement of the rule. The correct rule is that "the words of a document will, in cases of doubt, be construed most strongly against the party using them, or as it is sometimes expressed,

fortius contra proferentem. This principle has frequently been applied in the case of deeds, including those by way of lease or by way of mortgage". *Collison vs. Philadelphia Co.*, 233 Pa. 350 (1912). It is because the words of conveyance in a deed are ordinarily the words of the grantor that a deed is construed most strongly against a grantor. Where the opposite prevails, however, and the words of conveyance are those of the grantee, the rule requires that doubtful words be construed against the grantee for the reason that they are the grantee's words.

It follows that the grant of the "privilege of mining and removing through said described premises other coal belonging to the (grantee) its successors or assigns, or which may hereafter be acquired" is to be construed against Monongahela and the defendants in this case. It is obvious that the language requires construction. The Supreme Court of Pennsylvania expressly so stated (infra, p. 17). Defendants contend that the effect of this additional grant was to extinguish any possibility of reverter in the Luse heirs. It is petitioner's contention, on the other hand, that Monongahela incorporated this additional grant for the sole purpose of removing any doubt as to its right to transport through the Luse lands other coal owned by it on adjoining tracts. It also wanted to make sure that it could convey its own coal on such adjoining tracts to other parties, who would have similar rights to transport the coal. The only ambiguity in the language is whether the Luse heirs were bound by this additional grant to permit the transportation through their land of thousands upon thousands of acres of coal which were never owned by Monongahela nor conveyed by it to third parties. This ambiguity must be resolved in favor of the Luse heirs and against Monongahela, its successors and assigns. Otherwise, the use of the Luse lands for such purpose would "not only be a perversion of the intention to merely use such an estate to reach other coal, but such use would be a continual menace to the stability of the surface". *Webber vs. Vogel*, 189 Pa. 156, 160.

3. It is important to remember that Emerald received no rights whatever from Monongahela or from Frick, but only from its predecessor, Emerald Coal Company, which in turn received whatever rights it had from Frick. It is also important to note that Emerald Coal Company, despite the holding of the Trial Court and of the Supreme Court of Pennsylvania to the contrary, received from Frick merely a right of way through petitioner's lands to transport coal owned by Emerald which had never been owned by Monongahela or Frick. It is true that a grant of mining rights, whether by way of deed or lease, is in effect a sale of the coal: *Lazarus' Estate*, 145 Pa. 1 (1892). But it is manifest that Frick conveyed no mining rights to Emerald Coal Company by the Indenture of 1931, for that Indenture provided that the property was "conveyed to the Purchaser only for use by it for the purpose of transporting * * * coal from other properties now or hereafter owned by or controlled by it" (R. 879a). This is not a grant of mining rights nor a sale of the coal but only the grant of a right of way.

That the Luse heirs intended in the original deeds to permit any number of unknown grantees a right of way to transport coal through their lands ad infinitum would be absurd. It would clearly frustrate the intention of the parties to a deed conveying mining rights to coal that the subject of the grant should soon be exhausted or consumed: *Webber vs. Vogel*, 189 Pa. 156, 160.

The right of Emerald Coal Company to transport coal through petitioner's lands was accordingly non-existent. But even if there were such a right in Emerald Coal Company, it was expressly prohibited from transferring that right to Emerald Coal and Coke Company. Nor will it do to say that petitioner may not now complain of this illegal use by Emerald. A property owner may always restrain the illegal use of his lands by others.

4. Considerations of vital concern and importance to the coal industry of Pennsylvania are involved in this case.

Since the mining of coal is a major industry in Pennsylvania, affecting the entire economy of the State and the daily life and livelihood of thousands of its citizens, it may be understandable that the decisions of the Pennsylvania Courts manifest a solicitude for the interests of the industry. But there are more fundamental and more important considerations than the welfare of the coal industry in Pennsylvania, or indeed of any industry, anywhere. Certainly human rights and the great guaranties of the Constitution of the United States, safeguarding the property rights of men from invasion even by the States, are paramount to the interests of any industry, however great. It is the right of man to own and enjoy his property that is the simple and basic issue in this case.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

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Attorneys for Petitioner.

February, 1955.

OPINION OF THE SUPREME COURT OF PENNSYLVANIA.

ARNOLD, Justice (Nov. 8, 1954).

Plaintiff appeals from the decree of the court below dismissing his bill in equity whereby he sought to enjoin an alleged continuing trespass by defendants.

The facts found by the chancellor, and fully supported by the evidence, are:

In 1902 the Luse heirs, owners in fee, conveyed to the Monongahela River Consolidated Coal and Coke Company all of the coal of the Pittsburgh seam in and underlying some 300 acres of their land "together with * * * *right of way into, upon and under said land at such points and in such manner as may be proper and necessary* for the purpose of * * * mining * * * and carrying away said coal; hereby waiving surface support * * *; [and] together with the privilege of mining and removing through said described premises *other coal belonging to the [grantee], * * * its successors and assigns, or which may hereafter be acquired.*" (Italics supplied.)

In 1911, Monongahela conveyed these premises, together with 25 contiguous tracts of the same seam, to the H. C. Frick Coke Company. In 1931 Frick conveyed to Emerald Coal Company five of the twenty-six tracts, some of which lie under the surface retained by the Luses at the time of transfer of coal to Monongahela. This conveyance further provided that it was "only for use by * * * [Emerald] for the purpose of transporting to or adjacent to the Monongahela River coal from other properties now or hereafter owned or controlled by it" and that wheelage be paid by Emerald.

From 1931 to 1937, Emerald mined portions of this piece and constructed an underground haulageway, leaving about 80% of it still to be mined. In so doing, and because of ex-

cessive undulations making the mining of the coal dangerous and almost impossible, it was necessary to remove adjacent strata and thus deviate from the exact physical limits of the Pittsburgh seam.

In 1938, Emerald Coal Company conveyed a large area of the Pittsburgh seam, which included the portion beneath the Luse tract, to defendant, Emerald Coal and Coke Company. The defendant, United States Steel Company, became the successor to H. C. Frick Coke Company.

In 1945,—some 14 years after Emerald commenced mining and using the haulageway in the portion under question—plaintiff acquired about 95 acres of the surface of the Luse tract, which covered about one-half of the Luse coal conveyed by Frick to Emerald. At the time of so doing, he knew of Emerald's operations and of the existence of the haulageway, its purpose and use.

All of the coal under the plaintiff's surface has not been mined and there has not been an abandonment. Nor is there any claim that the operations of the defendants in any way interfere with the enjoyment of plaintiff's land. And as found by the court below: "The grades * * * [selected for the haulageway, to haul the coal there mined and as mined in adjoining areas] were chosen with the primary purposes in mind of conforming as nearly as possible with the actual space created by the removal of the coal within the corridor itself so as to require as little as possible excavation of bottom or taking down of top * * * the same was constructed in the usual and common practice in the mining industry."

The plaintiff agrees that Monongahela, Frick, and United States Steel would have the right to construct and use the haulageway to remove coal from lands owned by them. But he contends: (1) Frick did not have the right to grant to the Emerald Coal Company a "right of way" through the Luse coal to transport coal never owned by Monongahela, Frick or United States Steel; (2) Emerald did not have any right to deviate from the physical limits of the Pittsburgh seam to haul coal other than that acquired by Monongahela, Frick, or United States Steel.

[1] In the determination of the matter here involved, the following rules are basic and applicable: The language in the deed of conveyance should be construed most strongly against Luse and this plaintiff: Irwin v. Hoffman, 319 Pa. 8, 15, 179 A. 41; it should be so construed as to give effect to all its terms and provisions: Robinson v. Stover, 320 Pa. 308, 314, 182 A. 145; and to the intent of the parties: Waldman v. Shoemaker, 367 Pa. 587, 589, 80 A. 2d 776.

That the deed of conveyance of the coal to Monongahela contained two specific grants cannot be questioned. It conveyed the 300 acres of coal, with the "right of way into, upon and under said land *at such points and in such manner as may be necessary and proper*" for its mining and removal. And it granted a right of way to remove "through said described premises *other coal* belonging to the [Monongahela] * * * *its successors and assigns, or which may hereafter be acquired.*" (Italics supplied.)

[2, 3] Monongahela thus acquired a fee simple estate in all of the coal underlying the tract, and this was the subject of transfer by it: Gallagher v. Hicks, 216 Pa. 243, 65 A. 623. Particularly where, as here, the coal has not been exhausted or the estate abandoned, the space left by the removal of the coal belongs to the owner of the coal: Lillibridge v. Lackawanna Coal Co., 143 Pa. 293, 22 A. 1035, 13 L. R. A. 627. See also Webber v. Vogel, 189 Pa. 156, 42 A. 4. "* * * until that estate is terminated by the exhaustion of the coal, or lost by abandonment, the vendee is entitled to the possession of the coal, *and also of the space made by its removal, and may use such space in transporting coal from other lands.*" (Italics supplied.) Westerman v. Pennsylvania Salt Mfg. Co., 260 Pa. 140, 144, 103 A. 539, 540, 15 A. L. R. 943. See also New York & Pittston Coal Co. v. Hillside Coal & Iron Co., 225 Pa. 211, 214, 74 A. 26. Thus, Monongahela and its transferees had a right to remove the coal from the 300 acres conveyed to it by the Luses, and to use the resulting areaways to remove coal from other lands

owned by it, and such right continued to exist at least until the coal under that tract was exhausted or the operations thereunder abandoned. As heretofore noted, there still remain unmined about 80% of the portion underlying plaintiff's surface.

[4] Plaintiff contends, however, that the instrument of conveyance from Frick to Emerald was a grant only of a right of way for the purpose of hauling coal from lands of Emerald never owned by Monongahela or Frick. But, despite the provision for payment of wheelage, it conveyed title to the portion described, with the right of mining and removing it. Further, the arrangement between Frick and Emerald does not determine the rights of plaintiff—he must depend on the rights passing to him from his predecessors in title. Under those he had no right to complain about the use of the space resulting from the mining and removal of the coal. "If, then, the coal in place is a pure corporeal hereditament, the title in feesimple to which passes to a purchaser by apt conveyance, there would be no more propriety in claiming a title in the grantor to the space it occupies than there would be in claiming a similar right in a vendor of the surface to the space developed by the vendee in digging the cellar and foundations of a house. * * * In this way or chamber the plaintiffs, as owners of the surface, have no right or title. They have no access to it; they cannot use it; they are in no manner obstructed or injured by it. * * * We are asked to enjoin against the removal of coal from the adjoining tract * * * through the chamber or way made by the defendant through its own property, to-wit, the coal sold to them by the plaintiffs. * * * The plaintiffs would gain nothing which they do not now have, if we did. * * * The plaintiffs cannot possibly use any part of the space left by the removal of the coal, and hence they are not obstructed in the slightest degree. The right to use that space is exclusively in the defendant, and that use is not, and cannot be, questioned by the plaintiffs." Lillibridge

v. Lackawanna Coal Co., 143 Pa. 293, 302, 303, 22 A. 1035, 1037, 13 L. R. A. 627.

In addition, in the same deed of conveyance Mononga-hela was given a distinct and separate grant of right to remove "through the said described premises the coal belonging to [grantee] * * *, its successors and assigns, or which may hereafter be acquired." As stated by the court below: "The effect of this grant is to prevent any possibility of reverter to the surface owner as long as the sub-surface under the Luse tract is used to haul coal from other lands."

Plaintiff would have us interpret the grants from the Luses to Monongahela as restricting the right of transportation through those lands only to coal then owned or thereafter acquired by *it*. In other words that the grant of a portion of the coal under the tract to Emerald did not give Emerald the right to transport through the tract any of its coal which was never owned by Monongahela, Frick or United States Steel. But even though the coal might be exhausted, Monongahela was left with the rights to the space thereby left, to be used for hauling. And the instrument conveyed this right to remove "other coal belonging to the [Monongahela], * * * *its successors and assigns, or which may hereafter be acquired.*" Contrary to the contention of plaintiff, this was not restricted to Monongahela holdings but intended to include any coal owned by its transferees at such time as the right of way should be used. To hold otherwise would be to disregard the plain intendment of the words, "its successors and assigns," in the grant. See Decker v. New York Central & Hudson River Railroad Co., 57 Pa. Super. 432. This right was exclusive or independent of right to the Luse coal, and necessarily must be taken to give the right to remove the coal owned at any time by Monongahela and owned at any time by any of its transferees.

We can find no merit in plaintiff's contention that Emerald Coal Company violated any rights of plaintiff in going "outside of the physical limits of the Pittsburgh or River vein

of coal, in constructing the haulageway through said premises for the purpose of hauling coal other than the coal owned or acquired by Monongahela, Frick or U. S. Steel." He states: "The plaintiff does not raise this question as affecting the right of the United States Steel Company, the H. C. Frick Coke Company or the Monongahela River Consolidated Coal and Coke Company to remove through the vein of coal all the coal of the block of 2702 acres owned by the Monongahela River Consolidated Coal and Coke Company." The court below found that: "12. The only manner in which the coal underlying the Luse Tract could economically be recovered was by being mined as a part of a larger tract * * * 37. * * * as the mining of the Corridor coal progressed * * * it became apparent that the main division of the Pittsburgh seam of coal undulated to an excessive degree * * * 41. To attempt to haul coal over the excessively undulating bottom * * * would have been impossible and would have been unsafe. 42. * * * it was proper and necessary, by reason of the excessive undulations * * *, to construct the said haulageway to a limited extent in the strata immediately over and under said seam or vein of coal, *not only for the purpose of digging, mining, draining and ventilating and carrying away said coal * * *, but also for the purpose of affording a haulage road of practical, uniform and safe grade * * *"* (Italics supplied). This deviation was a proper exercise of right and one that was necessarily contemplated by the very purposes of the grant. C. F. Potter v. Rend, 201 Pa. 318, 50 A. 821. See also Commonwealth v. Fisher, 364 Pa. 422, 72 A. 2d 568; Commonwealth v. Fitzmartin, 376 Pa. 390, 102 A. 2d 893. In its findings the court further declared that Emerald did no more than was "customary, proper and necessary" for the mining and removal of the coal in the tract and in the construction of a haulageway. The right to do so was specifically granted by the deed, is acknowledged by plaintiff to exist in Emerald's grantors, and as discussed heretofore, was assignable and was given to Emerald, which could use

it for the purposes of removal of coal "which may hereafter be acquired" by the "successors and assigns" of Monongahela, Frick, or United States Steel.

[5] The foregoing also disposes of plaintiff's contention that defendants' "use of plaintiff's property * * * [is] a taking of land without due course of law and contrary to Article I, Sec. 11 of the Constitution of Pennsylvania [P. S.] and without due process of law contrary to the Fourteenth Amendment of the Constitution of the United States." There is no violation of any right; defendants are using, in a proper and legal manner, exactly what was granted by plaintiff's predecessors in title. The court also found as a fact that the seam of coal "lies at an average depth of greater than 353 feet beneath" the plaintiff's property. The haulageway is, on an average, 350 feet below plaintiff's surface, thus nullifying his contention that surface would be affected thereby.

One last question remains. Plaintiff filed his original complaint on December 11, 1950, and the preliminary objections of Emerald were sustained and the complaint dismissed as to it on November 19, 1951. On December 21, 1951, plaintiff amended his complaint pursuant to the order of the court granting leave to do so upon plaintiff's petition. Emerald, through error of counsel, sent its preliminary objections to local counsel in Greene County, on January 21, 1952. When presented to plaintiff's counsel for acceptance of service, on January 22, 1952, it was refused with plaintiff's counsel stating that he was going to file a motion for a decree pro confesso. This he did on the same day, and a decree was so entered. On the same day, but "a few moments" after entry of the decree, defendants filed their preliminary objections. Defendants filed petition to open, followed by a petition for leave to withdraw preliminary objections and to answer on the merits. The latter was granted February 23, 1952, and the decree opened February 25, 1952. Plaintiff contends that this was error.

[6, 7] Where a court makes absolute a rule to open judgment entered by default and to let defendant into a defense, we will reverse only where there has been a clear, manifest abuse of discretion: Downes v. Hodin, 377 Pa. 208, 104 A. 2d 495. Without further comment other than reference to the stated facts, we find no such abuse of discretion.

Decree affirmed; appellant to pay the costs.

ORDER [DENYING REARGUMENT].

Petition denied.

PER CURIAM.

November 30, 1954.